STATE OF MICHIGAN

COURT OF APPEALS

ROAN ROBART,

Plaintiff-Appellant,

v

ROBERT N. MCAVINCHEY,

Defendant-Appellee.

UNPUBLISHED
May 19, 2005

No. 253825
Genesee Circuit Court
LC No. 02-074502-NO

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant. We affirm.

Defendant entered into a residential lease agreement with four lessees, including plaintiff, for a one-year period. During the lease period, plaintiff attempted to remove a storm window that was sealed shut with paint. Plaintiff and another lessee attempted to remove the paint and loosen the window so that it would open. Plaintiff was injured when his hand broke through the glass pane of the storm window.

Plaintiff thereafter filed this action against defendant, alleging claims for common-law negligence, violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*., violations of a lessor's statutory duties under MCL 554.139, and breach of contract. Plaintiff later moved for partial summary disposition under MCR 2.116(C)(9) and (10) to preclude defendant from avoiding liability on the basis of ¶ 18 of the lease agreement, which provided that defendant, as the lessor, was not liable for any damage or injury to a lessee. Plaintiff argued that this exculpatory provision was void under MCL 554.633(1)(e). Defendant opposed plaintiff's motion and also filed a motion requesting summary disposition in his favor under MCR 2.116(C)(9) and (10), based on claims that he did not owe a duty to plaintiff and that ¶ 18 absolved him from any liability for plaintiff's injuries. The trial court granted defendant's motion and dismissed all of plaintiff's claims. The court also denied plaintiff's motion for reconsideration, finding no palpable error in its original decision.

On appeal, plaintiff first argues that the trial court should have refused to hear defendant's motion for summary disposition because it was filed less than twenty-one days before the hearing on the motion, contrary to MCR 2.116(G)(1)(a)(i). Because it is clear that this court rule was violated, the material question is whether plaintiff was prejudiced by the violation.

See MCR 2.613(A), and *Baker v DEC Int'l*, 218 Mich App 248, 261-262; 553 NW2d 667 (1996), rev'd in part on other grounds 458 Mich 247 (1998).

Defendant's motion was unnecessary to the extent that it was based on the same issue raised in plaintiff's motion, that being the validity of ¶ 18 in the lease agreement. Under MCR 2.116(I)(2), a court may grant summary disposition in favor of a nonmoving party if the court determines that the party is entitled to judgment as a matter of law. Further, it is not necessary that the nonmoving party or the trial court specifically cite MCR 2.116(I)(2). To the extent that defendant's motion exceeded the scope of plaintiff's motion, the record indicates that the trial court addressed this procedural deficiency by ascertaining from plaintiff's attorney that he had an opportunity to respond to defendant's arguments. Plaintiff also had an opportunity to move for reconsideration and, in fact, did so.

Examined in this context, reversal is not warranted for failure to comply with the twenty-one day notice requirement of MCR 2.116(G)(1)(a)(i). Limiting our review to the record developed in the trial court, *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990), plaintiff has not established that he was prejudiced by the procedural defect. We reject plaintiff's claim that prejudice was established because discovery was incomplete. Whether discovery has been completed is not material to the requirement of notice under MCR 2.116(G)(1)(a)(i), but rather is an appropriate consideration in determining whether summary disposition is premature. *Crawford v Michigan*, 208 Mich App 117, 122-123; 527 NW2d 30 (1994). A party opposing summary disposition on the ground that discovery is incomplete must at least assert that a dispute exists and support that allegation by some independent evidence. *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). Plaintiff did not do so here and has not established that summary disposition was premature.

On the merits, we review a trial court's decision granting or denying summary disposition de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002).

Plaintiff preserved his claim that ¶ 18 of the lease agreement violated MCL 554.633(1)(e) by moving for summary disposition on this ground. But because plaintiff gives only cursory treatment to his claim of error, we need not address his claim. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, . . . nor may he give issues cursory treatment with little or no citation of supporting authority." *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

In any event, because both parties submitted evidence to the trial court, and the record indicates that the trial court considered evidence outside the pleadings when granting summary disposition in favor of defendant, we review the trial court's decision under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under this subrule tests the factual support for a claim and is properly granted when the submitted evidence, viewed in a light most favorable to the opposing party, fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999); *Payne v Farm Bureau Ins*, 263 Mich App 521, 525; 688 NW2d 327 (2004).

Plaintiff has not established that the trial court incorrectly applied MCL 554.633(1)(e) to ¶ 18 of the lease agreement. Paragraph 18 of the lease agreement provides:

> Lessor shall not be liable for any damage or injury of or to the Lessee, Lessee's family, guests, invitees, agents or employees or to any person entering the Premises . . . , and Lessee hereby agrees to indemnify, defend and hold Lessor harmless from any and all claims or assertions of every kind and nature.

Pursuant to MCL 554.633(3), this provision is void to the extent that it has the effect of violating the prohibition in MCL 554.633(1)(e) against a lease agreement exculpating the lessor from "liability for the lessor's failure to perform, or negligent performance of, a duty imposed by law." The material question, therefore, is whether plaintiff established a genuine issue of material fact that the law imposed a duty on defendant relative to the hand injury that plaintiff sustained while attempting to loosen the storm window.

We find merit to plaintiff's claim that lease covenants required by MCL 554.139(1) can form the basis of a duty, and that compliance with applicable safety and health laws is a required covenant under this statutory provision. Such lease covenants can be a basis for holding a lessor liable for personal injuries to a lessee under tort or contract principles. *Mobil Oil Corp v Thorn*, 401 Mich 306, 311-313; 258 NW2d 30 (1977); but see *Summers v Detroit*, 206 Mich App 46, 52; 520 NW2d 356 (1994) (ordinance violation is not itself sufficient to impose a duty cognizable in negligence).

But plaintiff's offer of evidence regarding an alleged ordinance violation was made only in his motion for reconsideration under MCR 2.119(F)(3), and, hence, is relevant only for purposes of determining if the trial court abused its discretion in denying the motion for reconsideration. See *Kokx v Bylenga*, 241 Mich App 655, 658-659; 617 NW2d 368 (2000). Even then, plaintiff filed only excerpts of a maintenance code, but failed to establish any ordinance that was actually adopted and made applicable to defendant. Accordingly, we find no basis for disturbing the trial court's decision to deny reconsideration of its grant of summary disposition in favor of defendant.

Furthermore, it is clear from the trial court's decision denying reconsideration that it found that the covenants required by MCL 554.139(1) were contracted away in the lease agreement. Pursuant to MCL 554.139(2), the parties were permitted to modify the obligations under MCL 554.139(1) because the lease agreement was for a one-year period. The lessee's broad duties of repair and maintenance under ¶ 11 of the lease agreement were not conditioned on whether the matter involved a code or ordinance. As such, we are not persuaded that plaintiff established any actionable duty under MCL 554.139(1) that survived the terms of the parties' lease agreement. It therefore follows that there was no duty to extinguish under MCL 554.633(1)(e). Therefore, it is immaterial that the exculpatory clause in ¶ 18 of the agreement would be void, as applied to duties created under MCL 554.139.

Because MCL 554.633(1)(a) is based on the covenants in MCL 554.139, plaintiff has also failed to establish any basis for reversing the trial court's order of summary disposition on this ground. Whether based on tort or contract principles, plaintiff's claim fails on the merits because plaintiff did not establish an actionable duty under MCL 554.139(1).

We also reject plaintiff's claim that he established an actionable duty in avoidance of the open and obvious danger doctrine. We agree that an exculpatory provision is void under MCL 554.633(1)(e) and (3) if it waives the common-law duty to warn of latent defects. See *Calef v*

West, 252 Mich App 443; 652 NW2d 496 (2002). Perhaps more accurately, the "premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). The open and obvious doctrine is properly viewed as an integral part of the duty owed by a premises possessor to its invitees. *Id*. "A condition is open and obvious if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *O'Donnell v Garasic*, 259 Mich App 569, 574; 676 NW2d 213 (2003).

In this case, the trial court's decision granting summary disposition indicates that the court was cognizant that the exculpatory provision in ¶ 18 of the lease agreement could not extinguish defendant's duty to warn. But the court found no support for plaintiff's duty to warn theory of liability. We likewise conclude that plaintiff has not established any support for his position that defendant had a duty to warn him that the storm window did not contain safety glass. Plaintiff indicated in his deposition that he could see that the storm window was composed of glass and was painted shut. There is no evidence suggesting that a reasonably prudent person, upon casual inspection, would be able to ascertain the type of glass used in the storm window. Further, there is no evidence that a reasonably prudent person would treat a storm window of unknown composition as if it contained safety glass. The danger here arises from the fact that the storm window was composed of glass. A person of ordinary intelligence would be able to recognize that the windowpane was composed of glass, and that glass posed a danger of injury if it was broken.

Because the danger was open and obvious, the critical question for purposes of determining whether summary disposition was properly granted in favor of defendant is whether there was evidence to establish a genuine issue of material fact regarding whether "special aspects" of the open and obvious condition differentiated its risk from typical open and obvious risks, such as to create an unreasonable risk of harm. *Lugo, supra* at 517. "Special aspects" are defined by "whether an otherwise 'open and obvious' danger is 'effectively unavoidable' or 'impose[s] an unreasonably high risk of severe harm' to an invitee." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004), citing *Lugo, supra* at 518. The risk posed by the condition must be evaluated before the incident in the particular case. *Lugo, supra* at 518 n 2. The pertinent invitee is the reasonably prudent person. *Mann, supra* at 332 n 11.

Evaluated in this manner, plaintiff failed to establish that the storm window had special aspects such that a duty should be imposed on defendant to warn that the windowpane was not safety glass. Because plaintiff's duty to warn theory, like his claim under MCL 554.139, fails on the merits, there was no duty to extinguish under MCL 554.633(1)(e). Hence, as a matter of law, no duty survived the exculpatory clause in ¶ 18 of the lease agreement pursuant to MCL 554.633(1)(e) and (3).

Plaintiff additionally argues that ¶ 18 of the lease agreement was void under MCL 554.633(1)(g) and (m). Because plaintiff did not raise this argument in the trial court, it is not preserved. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). We note in passing that, contrary to plaintiff's assertion on appeal, subsection (1)(m) does not specifically prohibit exculpatory clauses that violate the MCPA, but rather states that "[a] rental agreement shall not include a provision that does 1 or more of the following: . . . Violates the Michigan

consumer protection act, 1976 PA 331, MCL 445.901 to 445.922." Plaintiff has not established that any provision in the lease agreement violates the MCPA.

Finally, we conclude that plaintiff has not established any MCPA claim that should have survived the trial court's grant of summary disposition. As with plaintiff's claims based on contract, negligence, and MCL 554.139, the record indicates that plaintiff had an opportunity to establish support for an MCPA claim that was not subject to the exculpatory clause in ¶ 18 of the lease agreement. Having reviewed the record and considered plaintiff's argument on appeal, we conclude that plaintiff failed to do so.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin